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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ERRECA'S, INC.,

Plaintiff and Appellant,

v.

SAFECO INSURANCE COMPANY OF
AMERICA, et al.,

Defendants and Respondents.

D051491

(Super. Ct. No. GIC836110)

APPEAL from a judgment of the Superior Court of San Diego County, Patricia Y. Cowett, Judge. Reversed and remanded.

Erreca's, Inc. appeals from a judgment confirming an arbitration award on its claims against Real Estate Collateral Management Company, Inc. (RECM) and RECM's surety, Safeco Insurance Company of America (Safeco). Erreca's contends the court erred in refusing to enforce a contractual provision permitting judicial review of the arbitration award for legal error.

After this matter was fully briefed and a few weeks before oral argument was initially scheduled, the California Supreme Court filed *Cable Connection, Inc. v. DIRECTV, Inc.* (2008) 44 Cal.4th 1334 (*Cable Connection*), which held that under California law an agreement to permit judicial review of the legal merits of an arbitration award is enforceable. We then took the matter off calendar and permitted the parties to file briefs on the new issues raised by the *Cable Connection* decision.

After reviewing *Cable Connection* and the parties' supplemental briefs, we conclude the superior court erred in failing to reach the merits of Erreca's legal challenges to the arbitration award. Accordingly, we reverse and remand for the court to rule on the issues raised by the parties.

FACTUAL AND PROCEDURAL BACKGROUND

Erreca's, an engineering contractor, entered into a construction contract with RECM to perform grading work for a large residential development project. The contract required the parties to submit all disputes to binding arbitration. After Erreca's completed the construction work, a dispute arose relating to the work performed and payment for the work.

Erreca's filed a complaint against RECM, seeking \$7 million for extra work performed under the contract. In the first eight causes of action, Erreca's alleged contract and other common law claims, asserting it suffered the increased performance costs because of the changed conditions and/or RECM's failure to disclose the true conditions. In the ninth cause of action, Erreca's alleged a claim under Civil Code section 3260, which entitles a contractor to penalty interest on funds wrongfully withheld by an owner.

Safeco was named only under the fourth cause of action for foreclosure of a mechanic's lien.

Six weeks after Erreca's filed an amended complaint, the parties entered into an agreement entitled "Arbitration Submission Agreement" ("Submission Agreement") that modified the arbitration provision in the construction contract. In the Submission Agreement, the parties agreed their dispute would be submitted to Judicial Arbitration and Mediation Services (JAMS) under JAMS rules, and that Safeco would also be a party to the arbitration. The Submission Agreement set forth detailed rules pertaining to prearbitration and arbitration matters. Many of these rules were identical to California statutory rules governing pretrial and trial procedure.

The Submission Agreement also contained a provision entitled "Governing Law," which stated: "This Agreement and the conduct of the arbitration proceedings shall be governed by the laws of the State of California. In rendering the Award, the Arbitrators will determine the rights and obligations of the Parties in accordance with the substantive laws of the State of California, as though acting as a court in a civil action in California. The Arbitrators shall not have the power to commit errors of law or legal reasoning and the award may be vacated or corrected pursuant to CCP §§ 1286.2 or 1286.6 for any such error. . . . The Arbitrators are not empowered to render any award that is not in accord with California law. Except as otherwise modified by this Agreement, the procedural rules shall be set forth in the CCP and California Rules of Court, including CCP § 998. . . ."

The parties stipulated to an arbitration panel consisting of three retired superior court judges: Robert May, Judith Ryan, and Luis Cardenas. The parties then engaged in extensive discovery and prearbitration briefing. During the 18-day hearing, the parties called approximately 25 witnesses and submitted hundreds of exhibits.

The arbitration panel then issued a 29-page "Interim Award." In this award, the panel majority (Judge May and Judge Ryan) found Erreca's did not prove any of its claims, except for the ninth cause of action seeking recovery for RECM's failure to pay retention amounts. In a dissenting/concurring decision, Judge Cardenas disagreed with the majority on its findings in RECM's favor, stating he believed an equitable analysis of the contract claims entitled Erreca's to one-half of its claim.

Erreca's then filed briefs requesting the panel to reconsider and/or correct its decision. After considering these arguments, the arbitration panel issued a 33-page Final Award in which the majority reaffirmed the Interim Award, but made several corrections and changes in the explanation of its decision. The arbitration panel also addressed fee and cost issues, and found RECM was the prevailing party on all causes of action, except the ninth cause of action. The panel found RECM incurred fees and costs of \$3,228,939.70 pertaining to the contract claims on which it prevailed. The panel awarded Erreca's \$1,220,785.01 on the ninth cause of action, which included the improperly retained amounts, interest, attorney fees, and costs. Thus, the total net award to RECM was \$2,008,154.69. The panel later issued a revised Final Award, upholding the final award, but correcting two numerical typographical errors.

RECM and Safeco ("respondents") then petitioned in the superior court seeking a judgment confirming the award. Erreca's opposed this petition, and filed its own petition seeking an order vacating and/or correcting the award. Errica's claimed the panel majority had made factual and legal errors in reaching its conclusions. Erreca's acknowledged the applicable statutes did not permit a court to review contractual arbitration awards for legal or factual errors, but sought a broader judicial review based on the "Governing Law" provision in the parties' Submission Agreement. In support of these arguments, Erreca's submitted a 4,661-page transcript of the arbitration hearing and 390 documentary exhibits.

Opposing this petition, respondents argued there was no statutory basis for vacating or correcting the arbitration award and the proposed expanded judicial review violated contractual arbitration statutes. Respondents also moved to strike the arbitration hearing transcript and the supporting exhibits, claiming the evidence was hearsay and irrelevant under the applicable limited judicial review, and the submitted transcript was not an "official" record of the proceedings.

After conducting a hearing, the court denied Erreca's' petition. Relying on *Crowell v. Downey Community Hospital Foundation* (2002) 95 Cal.App.4th 730, 739 (*Crowell*), the court stated it had no statutory authority to review the merits of the binding arbitration award and the parties could not expand the scope of review by agreement. After correcting the award for a typographical mistake, the court entered a judgment

confirming the final arbitration award, and awarded respondents costs and fees incurred in bringing the petition to confirm.¹

DISCUSSION

Erreca's contends the court erred in refusing to enforce the Submission Agreement's contractual provision providing for expanded judicial review of the arbitration award.

Under applicable statutes, the courts have limited authority to review a contractual arbitration award, and this authority does not include the power to vacate or correct an award for legal or factual error. (Code Civ. Proc., §§ 1286, 1286.2; *Moshonov v. Walsh* (2000) 22 Cal.4th 771, 775.) When the trial court ruled on the parties' petitions, several Courts of Appeal had held that parties cannot by voluntary agreement expand this statutory judicial review power. (See *Crowell, supra*, 95 Cal.App.4th at p. 739; *Oakland-Alameda County Coliseum Authority v. CC Partners* (2002) 101 Cal.App.4th 635, 645-646; *Old Republic Ins. Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 45 Cal.App.4th 631, 638.)

Relying on this authority, the trial court denied Erreca's' petition to vacate, concluding it had no authority to review the legal and/or factual findings by the arbitration panel. Erreca's then appealed, contending the court erred in refusing to enforce its agreement for expanded judicial review. Erreca's also reasserted its specific

¹ In the tentative order, the court had granted RECM's motion to strike the transcript of the arbitration hearing and the exhibits submitted at the hearing. The court's final judgment did not specifically repeat this ruling.

challenges to the arbitration award, including that the panel: (1) erred in concluding Erreca's did not prevail on its breach of contract claim based on its prevailing on its statutory claim for retained amounts (Civ. Code, § 3260); (2) "exceeded [its] powers" by failing to adequately explain its factual and legal conclusions; (3) erred in refusing to include arbitration fees in determining the amount recovered for purposes of Code of Civil Procedure section 998; and (4) erred in awarding Safeco attorney fees and not explaining the basis of this award.

After this matter was fully briefed and a few weeks before oral argument was scheduled, the California Supreme Court filed *Cable Connection*, which held that under California law the parties may obtain judicial review of the legal merits of an arbitration award by express agreement, and disapproved the *Crowell* line of cases. (*Cable Connection, supra*, 44 Cal.4th at p. 1354-1364.) In *Cable Connection*, the parties' contract contained the following provision: "The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error." (*Id.* at p. 1341-1342, fn. 3.) The California Supreme Court held the lower court erred by refusing to enforce this "clearly expressed agreement" for expanded judicial review. (*Id.* at p. 1364.)

We then requested the parties to file supplemental briefing as to the impact of *Cable Connection* on the issues raised on appeal. In their briefs, respondents recognized the "Governing Law" provision in the Submission Agreement "is indistinguishable from the language that the court in *Cable Connection* held sufficient to require judicial review

for legal error." Respondents thus acknowledged the trial court erred in declining to reach Erreca's contentions that the arbitration award contained legal errors.

Based on our review of the *Cable Connection* decision, we agree the trial court erred in refusing to reach Erreca's' challenges to the legal merits of the arbitration award. The court also erred in failing to address Erreca's' contentions regarding the adequacy of the arbitrator's explanation of its factual and legal findings. Paragraph 11 of the Submission Agreement states: "[T]he Arbitrators shall issue a written award setting forth the Arbitrators' findings of fact and conclusions of law and the reasoning for their decision."

To the extent the parties request that we exercise our discretion to reach the issues on appeal before the trial court has had the opportunity to do so, we decline this invitation. As a matter of appellate procedure, it is better practice for the trial court to rule on all issues before the issues are considered at the appellate level. (See *Uriarte v. United States Pipe & Foundry Co.* (1996) 51 Cal.App.4th 780, 791 ["Fundamentally, unlike trial, the purpose of an appeal is *not* to determine the case on its merits, but to review for trial court error.'"].) Moreover, although the contentions raised by Erreca's involve primarily legal questions, some of these issues may require a review and/or understanding of the voluminous factual record, or portions of the record. The parties disagree as to the admissibility of that record, and those issues may require the exercise of discretion by the trial court.

Accordingly, we reverse the judgment, and remand for the court to consider, and rule on, the issues raised in the parties' petitions to confirm, correct, and/or vacate the arbitration award.

DISPOSITION

Judgment reversed and the matter is remanded to the superior court. Each party to bear its own costs.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.